MUN SENG FOOK v. AIG MALAYSIA INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CIVIL APPEAL NO: WA-12ANCC-82-10-2017]
5 MARCH 2018

ARBITRATION: *Arbitration agreement – Arbitration clause – Steps taken by insurance company in court proceedings before applying for stay of proceedings – Whether insurance company precluded from relying on s. 10 of Arbitration Act 2005 to subsequently proceed with arbitration proceedings – Whether applicant lost right to sue with existence of arbitration clause – Clause in policy – Whether there was clear rejection or repudiation of policy to warrant commencement of arbitration – Whether applicant allowed to commence proceedings in court*

The appellant suffered injury to his left eye from an accident, leaving him blind in his left eye. The respondent had issued the appellant two personal accident policies ('the policy'). The appellant made a claim with the respondent. However, there was no reply from the respondent except for a letter dated 26 June 2013 where the respondent requested for the appellant's medical report. A medical report was obtained stating that the injuries suffered by the appellant were consistent with trauma resulting in traumatic optic neuropathy, which was possible in view of the impact of the accident resulting in loss of consciousness. The appellant subsequently filed a writ of summons claiming for, *inter alia*, the sum of RM900,000 for the loss of his left eyesight. The writ and statement of claim ('the writ action') was served on the respondent and the respondent filed the memorandum of appearance ('the appearance'). The matter was fixed for case management on 18 July 2017. During the case management, at the request of the respondent's solicitors, the appellant's solicitors mentioned on behalf of the respondent and requested for an extension of time for the respondent to file the statement of defence until 1 August 2017. The time limit for the respondent to file the statement of defence would have been 24 July 2017. The Sessions Court Judge ('SCJ') granted the extension. At no time did the respondent's solicitors notify the appellant's solicitors or the court of the respondent's intention to apply for stay of proceedings. On 28 July 2017, the respondent filed the application to stay the writ action. The SCJ held, *inter alia*: (i) as the parties had agreed to the terms of the agreement they are bound by it; (ii) pursuant to s. 10 of the Arbitration Act 2005 ('the Act'), in the event the respondent had not taken any steps in the proceedings then it was entitled to apply for a stay and refer the matter to arbitration; (iii) the appearance entered by the respondent did not amount to taking steps in the proceedings; and (iv) it was not necessary to consider the issues of limitation of time affecting the appellant pursuant to the policy. The appellant contended that the respondent had taken steps in the proceedings before applying for a stay of proceedings and was therefore precluded from relying on s. 10 of the Act. The appellant argued that on examination of all the clauses in the policy, he

had not lost the right to sue despite the existence of the arbitration clause. The arbitration clause was not where the making of an award is a condition precedent before an action could be commenced in court and therefore, the appellant contended that he was not barred from commencing an action in court.

Held (allowing appeal with costs):

(1) After the filing of appearance followed by the respondent's letter requesting for an extension of time to file the statement of defence and the grant of such request by the SCJ, there was no indication whatsoever from the respondent to the appellant or the court that an application for stay of the writ action would be filed and that it intended to take up the matter to arbitration. Nothing was stated in the respondent's letter that the application for such extension was without prejudice to its right to apply for stay of proceedings. (para 19)

(2) The extension of time for filing of the defence was granted by the SCJ as that was all the respondent had requested and as such, by its own conduct or action, the respondent had waived its reliance on the arbitration clause and must be taken to agree that the appellant's claim was to be resolved in the court. The respondent, having utilised the court's process under the Rules of Court 2012, s. 10 of the Act was no longer available as of right. Hence, the application for stay taken out just before the extended time given to file the statement of defence was irrelevant as the respondent had submitted to the jurisdiction of the court and was in breach of the mandatory terms of s. 10 of the Act. (para 21)

(3) Clause 20 of the policy states that the appellant, as the insured, shall commence arbitration in accordance with cl. 19 when he has lodged a claim and the claim is rejected. When the respondent had not rejected or repudiated the policy, cl. 15 envisages a situation where legal proceedings may commence *albeit* with a time limit and that it was open for the appellant to commence such legal proceedings instead of arbitration. On the facts, there was no clear rejection of claim or repudiation of the policy by the respondent and therefore, the time had not started to run for the purpose of the arbitration clause. In view of cl. 15, it was open to the appellant to commence proceedings in court and continue the same. (paras 29, 30 & 37)

(4) The respondent had not made it clear in the policy that, in the event there is no referral to arbitration, the appellant would lose his rights under cl. 15 of the policy to refer the matter to the courts. As such, the *contra proferentum* rule applied in favour of the appellant in view of the conflict between cl. 15 and cl. 19 of the policy. The appellant was entitled to maintain his action in court. Clause 19, being the arbitration clause referred to by the respondent, could not be viewed in isolation to defeat the appellant's claim under the policy. (para 36)

(5) The respondent had not fulfilled the pre-condition to s. 10 of the Act. No notice of arbitration had been issued by the respondent. The respondent, by being silent, reflected uncertainty on its part as to the steps that it was taking apart from the fact that it had failed to affirmatively state that the policy had been repudiated or the claim by the appellant rejected. The respondent was therefore precluded from referring the matter to the arbitration. The appellant could not be barred from commencing an action in court purely by reason of the arbitration clause in the policy. (paras 39 & 41)

Case(s) referred to:
CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd [2015] 1 LNS 149 HC ***(refd)***
Ford's Hotel Company Ltd v. Bartlett [1986] AC 1 ***(refd)***
Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(dist)***
Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***
Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co [1985] 1 LNS 95 HC ***(refd)***
Tay Eng Chuan v. Ace Insurance Ltd [2008] 4 SLR (R) 95 ***(refd)***
Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd [2010] 3 CLJ 634 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952 (since repealed), s. 6
Arbitration Act 2005, s. 10
Subordinate Courts Act 1948, Third Schedule s. 2

For the appellant - Sharmini Navaratnam; M/s Siva Dharma & Assocs
For the respondent - Ahmad Aizek Busu Abdul Aziz; M/s Felix Raj Chambers

*[**Editor's note:** Appeal from Sessions Court, Kuala Lumpur; Suit No: WA-B52NCC-336-06-2017]*

Reported by S Barathi

JUDGMENT

Noorin Badaruddin J:

[1] This is an appeal which arises from the decision of the learned Sessions Court Judge ("Sessions Judge") on 6 October 2017 allowing the respondent's/defendant's application to stay the appellant's/plaintiff's action in favour of arbitration in Malaysia pursuant to s. 10 of the Arbitration Act 2005 ('the Act') and/or s. 2 under the Third Schedule of the Subordinate Courts Act 1948 and/or the inherent jurisdiction of the court.

[2] The appellant/plaintiff has appealed against the order *vide* notice of appeal dated 13 October 2017.

[3] The parties will be referred to as appellant and respondent

A **Background Facts**

[4] The case concerns the appellant, a 57 year old man who suffered injury to his left eye from an accident that happened on 12 July 2011 leaving him blind in his left eye. The respondent had issued the appellant two personal accident policies dated 5 February 2010 ('the policy').

B

[5] The appellant made a claim with the respondent. No reply from the respondent was received by the appellant except for a letter dated 26 June 2013 where the respondent requested for the appellant's medical report to be forwarded to them. A medical report dated 9 April 2012 was obtained stating that the injuries suffered by the appellant are consistent with trauma resulting in traumatic optic neuropathy which is possible in view of the impact of the accident resulting in loss of consciousness.

C

[6] The appellant filed a writ of summons dated 14 June 2017 claiming for, *inter alia,* the sum of RM900,000 for the loss of his left eyesight. The writ and statement of claim ('the writ action') was served on the respondent on 3 July 2017. The respondent filed the memorandum of appearance ('the appearance') dated 10 July 2017. The matter was fixed for case management on 18 July 2017.

D

[7] During the case management on 18 July 2017, at the requests of the respondent's solicitors, the appellant's solicitors mentioned on behalf of the respondent and requested for an extension of time for the respondent to file the statement of defence until 1 August 2017. The time limit for the respondent to file the statement of defence would have been 24 July 2017. The learned Sessions Judge granted the extension. At no time did the respondent's solicitors notify the appellant's solicitors or the court of the respondent's intention to apply for stay of proceedings.

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[8] On 28 July 2017, the respondent filed the application to stay the writ action.

G **Findings Of The Learned Sessions Court Judge**

[9] It is the learned Sessions Judge's findings that as the parties had agreed to the terms of the agreement they are bound by it. The learned Sessions Judge further held that pursuant to s. 10 of the Act, in the event the respondent had not taken any steps in the proceedings then it is entitled to apply for a stay and refer the matter to arbitration. It is the findings of the learned Sessions Judge that the appearance entered by the respondent does not amount to taking steps in the proceedings and it is not necessary to consider issues of limitation of time affecting the plaintiff pursuant to the policy.

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I **The Appellant's Contentions**

[10] Summarily, it is the appellant's contention that the respondent had taken steps in the proceedings before applying for a stay of proceedings and is therefore precluded from relying on s. 10 of the Act. The appellant argued

that on examination of all the clauses in the policy, he has not lost the right to sue despite the existence of the arbitration clause. It is the appellant's case that the arbitration clause in this case is not a *Scott v. Avery* clause where the making of an award is a condition precedent before an action in court can commence. According to the appellant, as this is not a *Scott v. Avery* clause policy, the appellant is not barred from commencing an action in court.

The Respondent's Contentions

[11] It is the respondent's submission that pursuant to cl. 19 of the policy, all disputes arising from the policy shall be referred to arbitration and as such parties are bound by the terms stipulated therein. Further, the respondent argues that pursuant to s. 10 of the Act when there is in existence a valid and binding arbitration agreement between parties, the court is empowered to order a mandatory stay of proceedings and refer the parties to arbitration.

[12] According to the respondent, the appellant's claim is rejected pursuant to the respondent's letter dated 26 June 2013.

[13] The respondent further submits that by filing the appearance, it has not taken any steps in the proceedings and as such it is entitled to the order granted by the learned Sessions Judge.

Findings

[14] The application before the learned Sessions Judge is founded on s. 10 of the Act which states as follows:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[15] In *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213; [2002] 2 MLJ 625, the Federal Court had affirmed that the entry of appearance conditional or unconditional is permitted and does not amount to a step in the proceedings. But that is not the only position. The Federal Court summarised the legal position in Malaysia as follows:

> Therefore, the legal position in Malaysia may be neatly summarised as follows:
>
> (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not

A amount to a step in the proceedings within the meaning of the s. 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s. 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;

(c) *if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration*. (emphasis added)

[16] In *Ford's Hotel Company Ltd v. Bartlett* [1986] AC 1, the House of Lords held that a request for extension of time for serving of defence is considered a step taken in the proceedings. Lord Halsbury LC stated in the following fashion:

> The words in the 4th section of the Arbitration Act 1889 which your Lordships have to construe are these, "before delivering any pleadings or taking any other steps in the proceedings." The defendants took out a summon in this form: "Let all parties concerned attend the master at chambers on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence herein." Upon this summons the master made an order that the defendants should have fourteen days' further time for delivering their defence. The sole question upon which we have been engaged so long is whether this is a "step in the proceedings." It seems to be that it is.

[17] Back in Malaysia, in *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] 1 LNS 149 Dato' Mary Lim Thiam Suan J (as Her Ladyship then was) had refused a stay application as Her Ladyship found that the defendant therein had taken step in the proceedings before filing the application for stay. Earlier in *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2010] 3 CLJ 634 Her Ladyship expressed her view that a party who seeks to rely on the arbitration clause and stay proceedings in court must make the application promptly even before filing appearance. In *CLLS Power System Sdn Bhd (supra)* Her Ladyship discussed as follows:

> [30] In *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [Kuala Lumpur High Court Civil Suit No: D5(D6)-22-734-2008], I had expressed the view that with the mandatory terms in section 10, applicants who seek to rely on the arbitration clause and stay proceedings in Court must make the application for stay promptly, even before filing of an Appearance. I had made that observation after discussing the Federal Court's decision in *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* [2002] 3 CLJ 213; [2002] 2 MLJ 625. In *Sanwell*, again, a case decided under the old

Arbitration Act of 1952, the Federal Court had observed and distinguished the facts in another case, that of *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131; [1998] 2 BLJ 131; [1998] 7 MLJ 691, that the Defendant there had taken "more than one step in the proceedings, ie, one step in filing the conditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s. 6 of the Act, the second step certainly was." In *Winsin Enterprise*, an order for stay under section 10 was refused because the defendant had sought and was granted by the plaintiff, an extension of time to file Defence. I took the view that the act of seeking for an extension of time to file Defence was a step taken in the proceedings in Court, depriving the defendant order of stay sought.

[31] It is the view of this Court that with the new Rules of Court 2012 doing away with the filing of Conditional Appearance, there is now greater reason to insist on strict compliance with the provisions of Act 646. Added to this are the recent amendments to Act 646 which remind the Court of non-intervention save in matters expressly provided - see section 8 of Act 646.

[32] Now, section 10 requires an applicant such as the Defendant to file for a stay of the proceedings in Court 'before taking any other steps in the proceedings.' In fact, such an application may be made through the procedure provided under section 50. The object of such a requirement is clearly to preserve the Defendant's position of non-submission to jurisdiction for the purpose of resolving the dispute or claim in question. Once the Defendant has made that application, it may take any other step and that would not compromise or taken as having compromised the Defendant's position on the appropriate forum for resolution of the dispute or claim.

[18] In *CLLS Power System Sdn Bhd (supra)* the notice to produce was issued without qualification or reservation. In that case, the court was of the view that the dictates of s. 10 of the Act do not permit the defendant to take any other steps save for applying for a mandatory stay. A step in the proceedings is an act which invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed.

[19] Returning to the present case, after the filing of appearance on 10 July 2017 followed by the respondent's letter of 11 July 2017 requesting for an extension of time to file the statement of defence and the grant of such request by the learned Sessions Judge, there was no indication whatsoever from the respondent to the appellant or the court that an application for stay of the writ action will be filed and that it intends to take up the matter to arbitration. Nothing was stated in the respondent's letter that the application for such extension is without prejudice to its right to apply for stay of proceedings.

[20] It is of the considered view that the respondent has submitted to the jurisdiction of the court on the first case management dated on 18 July 2017 when the respondent did not attend court but requested the appellant's solicitors to mention on their behalf to request for an extension of time to file the statement of defence to 1 August 2017. The respondent's solicitors did not attend personally to inform the court that the respondent is taking out an application for stay or that the request for extension of time to file the statement of defence was on a without prejudice basis. In *Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co* [1985] 1 LNS 95; [1986] 1 MLJ 347 the defendants therein had appeared and attended the hearing of the summons for directions without any objection or qualification. The High Court held that the defendants had already taken a step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952. Tan Chiaw Thong J (as he then was) stated as follows:

> It is not disputed that at the hearing of the Summons for Directions there was no indication by the defendants of any objection to the hearing thereof with the result that the Summons for Directions was heard and the various orders made by the court thereon.

[21] The learned Sessions Judge had granted the extension of time for the defence to be filed by the respondent as that was all that the respondent requested and as such, by its own conduct or action, the respondent had waived reliance on the arbitration clause and must be taken to agree that the appellant's claim be resolved in the court. The respondent had utilised the court's process as found in the Rules of Court 2012 and as such, it must be regarded as having taken a step other than the step of applying for a stay. Section 10 of the Act is no longer available as of right and the application for stay taken out on 28 July 2017 just before the extended time given to file the statement of defence is irrelevant as the respondent has submitted to the jurisdiction of the court and in breach of the mandatory terms of s. 10 of the Act.

[22] The next issue is whether the appellant is barred from commencing the action in court purely by reason of the arbitration clause in the policy.

[23] Obviously, the respondent is relying heavily on cl. 19 of the policy which provides that any disputes between the insured and the insurer in relation to the true construction of the policy or the rights and liabilities of the parties shall be referred to arbitration. But the court is called to look at the other clauses in the policy.

[24] The other relevant clauses of the policy are as follows:

> Clause 15
>
> Legal Proceedings
>
> No action in law or equity shall be brought to recover on this policy prior to the expiration of sixty (60) days after written proof of loss has been filed in accordance with the requirements of this policy, nor shall such

action be brought at all unless brought within one (1) year from the expiration of the time within which the written proof or loss is required by the policy.

Clause 20

Limitation of Time of Bringing Arbitration

If a claim is made under the policy and is rejected by the CMI, the Insured or his/her legal personal representatives shall commence arbitration proceedings in accordance with Clause 19 of Section 7 hereof within six (6) months of such rejection, failing which CMI shall be discharged from all liability whatsoever for that claim.

[25] The way the policy is drafted and certainly in this case, the time limit is only on the appellant as the claimant. The accident is said to have occurred on 12 July 2011. It is pertinent to note that the respondent's letter of 26 June 2013 referred to the appellant's letter of 3 May 2013. On the facts of the case, there is no issue that the appellant as the claimant has lodged his claim within the time limit.

[26] The respondent on the other hand averred that by its letter of 26 June 2013, the appellant's claim has been rejected. The respondent referred to para. 6 of the letter which states as follows:

6. Please understand that based on the information and documents that were provided as at today for our investigation, we are unable to conclude that your claim falls within the ambit of the policy.

[27] But the entire content of the letter is as follows:

Mr Mun Seng Fook
34, Lorong Nangka 7
Taman Desa Damai
14000 Bukit Mertajam
Pulau Pinang

Dear Sir,

Re: Juara Personal Accident Policy No. 2500030671 and 2500020672 Claim Ref No: 600332876 and 600332880

1. Reference to the above and your letter dated 3rd May 2013

2. We would appreciate if you can revert to us with a medical report from your Ophthalmologist (s) that you have been consulting with as at the time of the incident.

3. With respect to the contents of your letter we note, among others, that no photographs were taken of the damaged windscreen and that you were wearing your spectacles at the time of the incident.

4. Further to the above we note that the Hospital Bukit Mertajam has stated in their report that no glass fragments or debris was found in your left eye when an examination was conducted on the date of the incident.

A 5. Bearing in mind the above and on a strictly without prejudice basis, we seek your cooperation to provide to us evidence that, among others, independently demonstrates that it was the alleged incident on 12th July 2011 which has resulted in the alleged injury that you have sustained to your left eye.

B 6. Please understand that based on the information and documents that were provided as at today for our investigation, we are unable to conclude that your claim falls within the ambit of the policy.

7. We trust that you will appreciate the contents herein and look forward to your response

C 8. In the interim our rights and interest are hereby reserved in full including but not limited to our right to rely upon any terms, conditions, warranties or exclusions in the Policies or circumstances that may affect coverage

9. Should you require any assistance please contact our Customer Service
D Representatives at 1800-88-88-11 every Mondays to Fridays from 9.00AM until 5.00 PM

[28] A medical report by Dr Andrew Lim Keat Eu, a consultant ophthalmologist dated 9 April 2012 was obtained and referred to by the appellant in his statement of claim.

E **[29]** It is of the considered view that the respondent's letter of 26 June 2013 was not a letter of rejection to the appellant's claim but instead a letter of facts finding. That letter does not state or indicate that the appellant's claim was rejected and neither does the letter states that the policy was repudiated. In the circumstances time will not start to run for the purpose of the arbitration
F clause. As stated in the above, cl. 20 of the policy states that the appellant as the insured shall commence arbitration in accordance with cl. 19 when he has lodged a claim and the claim is rejected.

Clause 20

G Limitation of Time of Bringing Arbitration

If a claim is made under the policy and is **rejected** by the CMI, the Insured or his/her legal personal representatives shall commence arbitration proceedings in accordance with Clause 19 of Section 7 hereof within six (6) months of such rejection, failing which CMI shall be discharged from all liability whatsoever for that claim.

H

(emphasis added)

[30] The word "rejected" in cl. 20 is imperative. If there is no rejection of the claim when will the time starts to run? When will cl. 19 kicks in or crystallise? It is of the considered view that when the respondent has not
I rejected or repudiate the policy, cl. 15 of the policy envisages a situation where legal proceedings may commence *albeit* with a time limit and that it is opened for the appellant to commence such legal proceedings instead of

arbitration. As such, in the event the appellant failed to refer the dispute to arbitration within the stipulated time in the arbitration clause, the appellant lost his right to arbitration but he could still bring an action pursuant to cl. 15 of the policy.

[31] In *Tay Eng Chuan v. Ace Insurance Ltd* [2008] 4 SLR (R) 95 the Singapore Court of Appeal held that breach of the arbitration clause could not negate the right of action in courts. The court held as follows:

> (1) The High Court Judge's interpretation that Tay could not rely on the legal Action Clause because he breached the Arbitration Clause was not the only possible meaning because of the qualifying words, *viz*, "subject to the [Arbitration Clause]" contained in the same. Read with the qualifying words, the clauses could also mean that since the appellant failed to refer the dispute to arbitration within three months, he lost his right to arbitration, but nothing more; he could still rely on the Legal Action Clause to bring an action in a court of law. Faced with those two possible meanings, the court applied the *contra proferentum* rule and construed the clauses against Ace Insurance; as a result, Tay was entitled to rely on the Legal Action Clause to commence his action in court

[32] The alternative interpretation adopted by the Singapore Court of Appeal in *Tay Eng Chuan v. Ace Insurance Ltd (supra)* was supported following the passage from *Halsbury's Laws of Singapore*. The court stated:

> This alternative interpretation of the Qualifying Words is supported by the following passage from *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.049:
>
> > Contractual time bars may apply to bar either the claim or the arbitration. **Where a contractual time limit bars only the right to proceed to arbitration, the parties may nevertheless proceed to litigate** the dispute in the forum where the jurisdiction could be established over the parties. (emphasis added)
>
> On this interpretation of the Qualifying Words, breach of the Arbitration Clause would not negate the right of action conferred by the Legal Action Clause.

[33] The Singapore Court of Appeal in that case further held that although the insured therein had lost the right to arbitration as he had not complied with the clause, the insurance company had not lost that right. The court stated that there was nothing to prevent the insurance company from applying to court to stay the action in favour of arbitration. However, the insurance company therein chose to apply to strike out the insured's claim and by doing so, had taken a step in the proceedings and had lost the right to arbitration.

[34] In discussing the *Scott* and *Avery* clauses, the same court found that the arbitration clauses read together with the condition precedent clause and the fact that the policy shall be determined and may be enforced in accordance with the laws of Singapore were disparate provisions in the policy and no

A insured person can be expected to know that he must read all the clauses together and further understand them to mean he will forfeit his right to sue under the policy if he fails to refer any disputes for differences to arbitration within three months from the day he and the respondent are unable to settle the dispute or difference. Further, according to the Singapore Court of
B Appeal, the legal action clause does not state that the appellant's right to commence action in court only arises after compliance with arbitration clause. It was further held that contracts of insurance are contracts which *uberrime fides* is required, not only from the assured but also from the company assuring. The court is of the view that it is incumbent on the
C insurance company to put clearly on the proposal form, the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance. The court stated further as follows:

> 30. More importantly, the above precedents on *Scott v. Avery* clauses show
> D that these clauses have always expressly stated (in the context of insurance contracts specifically) that the obtaining of an arbitral award is a condition precedent to the insured's right to sue on the contract. In the present case, there is no such express provision in either the Condition Precedent Clause or the Arbitration Clause (or, for that matter, the Legal Action Clause (see further [31]-[32] below)). The Condition Precedent
> E Clause merely states that compliance with, *inter alia*, the Arbitration Clause is "a condition precedent to the liability of the Company **to make any payment under [the] Policy**" [emphasis added]. In our view, the respondent's liability to make payment under the Policy cannot be equated with the appellant's right to sue on the Policy so as to restrict such right of action where any of the terms or provisions of the Policy
> F have not been adhered to. This is because just as the insured is under a legal obligation to disclose fully to the insurer, on an *uberrima fides* basis, all material facts relating to his personal conditions and circumstances, the insurer must also inform the insured of any unusual clause(s) in an insurance policy that may deprive the latter of his right to make a claim. As Woo Bih Li J stated in *NTUC Co-operative Insurance Commonwealth*
> G *Enterprise Ltd v. Chiang Soong Chee* [2008] 2 SLR 373 ("*NTUC Co-operative Insurance*") (at [50]):
>
> > Besides highlighting what the cover of each policy extends to, insurers should also highlight the more obvious areas which the cover does not extend to, although this may be counter-intuitive
> H to them?
>
> 31. Even if the Legal Action Clause, which specifically refers to the insured's right of action, is taken into consideration (although the respondent did not in fact rely on this provision to support its contention that the appellant had lost his right to commence OS 859/2007), it does
> I not advance the argument that the Policy contained a *Scott v. Avery* clause for two reasons. The first is that the Condition Precedent Clause, the Arbitration Clause and the Legal Action Clause are set out as disparate provisions in the Policy (see in this regard the point which we made earlier at [29] above). No insured person can be expected to know that he must

read all three clauses together and, further, understand them (read collectively) to mean that he will *forfeit* his right to sue on the Policy if he fails to refer any dispute or difference to arbitration within three months from the day on which he and the respondent are unable to settle the dispute or difference among themselves. Indeed, it would not be far-fetched for us to state that it might even be difficult for a lawyer who is not familiar with a *Scott v. Avery* clause to read these three clauses together and understand them to constitute, collectively, a *Scott v. Avery* clause.

[32] Second, the legal action clause suffers from the same defect as that pointed out earlier (at [25] above) in respect of the condition precedent clause and the arbitration clause - ie, the legal action clause does not state that the appellant's right to commence an action in court arises only upon compliance with the Arbitration Clause. In our view, the qualifying words *per se* are not sufficiently clear to import such an effect into the legal action clause in view of the insurer's legal obligation to inform the insured clearly of any provisions which might deprive the latter of his right to make a claim under the insurance policy. We earlier referred (at [30] above) to Woo J's observations on this particular point in *NTUC Co-operative Insurance* at [50]. We would also draw attention to the English Court of Appeal's comments in *In re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 ("*Bradley*") at 430-431 (per Farwell LJ) as follows:

> Contracts of insurance are contracts in which *uberrima fides* is required, not only from the assured, but also from the company assuring. ... It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed "*contra proferentes*" applies strongly against the company: [In the matter of an arbitration between Etherington and The Lancashire and *Yorkshire Accident Insurance Company* [1909] 1 KB 591].... It is, in my opinion, incumbent on the company to put clearly on the proposal form the acts which the assured is by the policy to covenant to perform and to make clear in the policy the conditions, non-performance of which will entail the loss of all benefits of the insurance.

[33] In our view, the passages quoted from *NTUC Co-operative Insurance* and *Bradley* (at, respectively, [30] and [32] above) are apt to apply to any argument, whether based on a collective reading of the Condition Precedent Clause and the Arbitration Clause alone (which is the respondent's position) or a collective reading of these two clauses together with the Legal Action Clause (which is the alternative stance posited at [31] above), that the Policy contained a *Scott v Avery* clause.

Farwell LJ's comments in *Bradley* also bring us to the third counter-argument against the respondent's contention on issue (a), *viz*, the *contra proferentem* rule.

[35] In regards to the *contra proferentum* rule, the court further stated:

> The *contra proferentem* rule
>
> 34. In *Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, Lord Mustill described the *contra proferentem* principle (at 77) as follows:
>
> > [A] person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is a reason to suppose that he is not.
>
> In *Bradley*, Cozens-Hardy MR, who delivered the leading judgment of the court, stated (at 422) that "[a] policy of this nature [ie, an insurance policy], in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder" (see also our earlier reference (at [32] above) to Farwell LJ's pronouncement on this particular issue in *Bradley* at 430).
>
> 35. The *contra proferentem* rule is particularly pertinent in insurance policies because these policies are invariably drafted and/or vetted by experts for the benefit of insurers so as to protect the latter's interest. Invariably, the insured has no choice but to accept whatever terms and conditions, especially general terms and conditions, are imposed by the insurer. In our view, the rule applies in the present case. The meaning of the Qualifying Words and their effect on the right of legal action conferred by the Legal Action Clause are unclear. As we pointed out earlier, these words could mean that in the event of a breach of the Arbitration Clause, the appellant would either: (a) lose the right of action conferred by the Legal Action Clause (see [20] above), or (b) lose only his right of arbitration but not his right of legal action (see [21] above). The former interpretation favours the respondent, while the latter favours the appellant. In these circumstances, the *contra proferentem* rule entails that the respondent should not be allowed to construe the Qualifying Words as negating the appellant's right to sue on the Policy on the basis of the latter's breach of the Arbitration Clause. Similarly, the Condition Precedent Clause, which refers to only the respondent's "liability? to make any payment under [the] Policy" without mentioning the appellant's right to sue on the Policy (a point which we highlighted earlier at [30] above), should likewise be construed against the respondent; ie, this clause cannot be read together with either the Arbitration Clause alone or both the Arbitration Clause and the Legal Action Clause so as to nullify the appellant's right to sue on the Policy despite his breach of the Arbitration Clause.

[36] This court finds that in the policy herein, the respondent has not made it clear to the appellant that in the event there is no referral to arbitration, the appellant will lose his rights under cl. 15 of the policy to refer the matter to the courts. As such, the *contra proferentum* rule applied in favour of the appellant in view of the conflict between cl. 15 and cl. 19 of the policy and

the appellant is entitled to maintain his action in court. Clause 19 being the arbitration clause referred to by the respondent cannot be viewed in isolation to defeat the appellant's claim under the policy.

[37] At the risk of repetition, on the facts of the case herein, there is no clear rejection of claim or repudiation of the policy by the respondent and if a claim is not rejected, then the time has not started to run for the purpose of the arbitration clause. In view of cl. 15 allowing for legal proceedings, it is open to the appellant to commence proceedings in court and continue the same.

[38] It is also the contention of the respondent that pursuant to s. 10 of the Act, where there is in existence a valid and binding arbitration agreement between the parties relating to the subject matter of the claim in question, the court is empowered to order a mandatory stay of proceedings and refer the parties to arbitration. The Federal Court decision in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1 is referred to. The respondent further submits that it is ready and willing to do all the things necessary for the proper conduct of the arbitration in accordance with the terms contained in the policy.

[39] It will be very comforting to know if there is indeed an action towards arbitration is taken by the respondent prior to the writ action being filed by the appellant herein. The respondent has been silent. No notice of arbitration has been issued by the respondent. In fact, the conduct of the respondent reflects uncertainty on its part as to the steps that it is taking apart from the fact that it has failed to affirmatively state that the policy has been repudiated or the claim by the appellant rejected.

[40] In regards to the Federal Court's decision in *Press Metal Sarawak Sdn Bhd (supra)*, it is glaring that in that case, no discussion in respect of the main issue herein was raised ie, whether the appellant has taken any steps in the proceedings prior to applying for a stay of proceedings. In addition, unlike the respondent herein, the defendant in *Press Metal Sarawak (supra)* filed the notice of appearance and the application for stay simultaneously. Further, in that case, there was a dispute between the plaintiff and the defendant wherein the defendant issued notice of arbitration but was not agreed to by the plaintiff who commenced action in court.

Conclusion

[41] This court is satisfied that the respondent has not fulfilled the precondition to s. 10 of the Act and therefore is precluded from referring the matter to arbitration. The appellant cannot be barred from commencing action in court purely by reason of the arbitration clause in the policy and for the foregoing reasons, this court allowed the appeal with costs.